

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAPHUS ELEY,	§	
	§	No. 357, 2005
Defendant Below,	§	
Appellant,	§	Court Below--Superior Court
	§	of the State of Delaware,
v.	§	in and for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 9906016291
Appellee.	§	

Submitted: December 16, 2005

Decided: February 21, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 21st day of February 2006, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) In 1999, a Superior Court jury convicted Raphus Eley of two counts of Burglary in the Third Degree, one count of Assault in the Third Degree and two counts of Misdemeanor Theft. The Superior Court sentenced Eley on one count to three years at Level V suspended for probation after he successfully completed substance abuse treatment

programs at Levels V and IV. On each of the remaining counts, the Superior Court imposed a suspended sentence and probation.

(2) On July 15, 2005, the Superior Court found Eley guilty of violation of probation (VOP) and resentenced him to a total of five years at Level V followed by six months at Level IV.¹ This appeal followed.

(3) Eley's trial counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). The Court's standard and scope of review is twofold. First, the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal.² Second, the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.³

(4) Eley's counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. By letter, Eley's counsel informed him of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw, the Rule 26(c) brief

¹ This was Eley's second conviction of VOP; the first occurred in November 2002. A charge of VOP was dismissed in June 2004.

²*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738 (1967).

³*Id.*

and a transcript of the VOP hearing. Eley was also informed of his right to supplement his counsel's presentation. Eley responded with two issues for this Court's consideration. The State has responded to the position taken by counsel as well as to the issues raised by Eley and has moved to affirm the Superior Court's judgment.

(5) Eley's issues concern the sentences that the Superior Court imposed on his 1999 convictions.⁴ Those issues are not justiciable in this appeal. Eley may not collaterally attack those sentences in this appeal from a VOP.⁵

(6) The Court has reviewed the record carefully and has concluded that Eley's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that counsel made a conscientious effort to examine the record and properly determined that Eley could not raise a meritorious claim in this appeal.

⁴Eley contends that the Superior Court (i) violated double jeopardy when sentencing him to consecutive terms of incarceration; and (ii) violated a statutory limitation on probation when sentencing him to consecutive periods of probation.

⁵*Weaver v. State*, 779 A.2d 254, 258 n.17 (Del. 2001). Eley's challenge to the periods of probation is also without merit. *See* Del. Code Ann. tit. 11, § 4333(j) (2004 Supp.) (providing that limitation not applicable to probation imposed prior to June 1, 2003, absent order entered for good cause shown after consideration of application by Department of Correction for sentence modification).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Randy J. Holland
Justice